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Case No. 92-811

IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR V. DEUTCSH,

Petitioner,

v.

BIRMINGHAM POST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court should review a dismissal of a libel action brought by a public official where no court that has considered the case has ever found a single element of the tort of libel present.

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BRIEF IN OPPOSITION

Respondent Birmingham Post Company ("the newspaper"),[1] publisher of the *Birmingham Post-Herald* ("*Post-Herald*"), respectfully prays that the instant Petition be denied. Review in this Court is inappropriate because the First Amendment to the United States Constitution prohibits a public official from recovering damages for libel unless he proves by clear and convincing evidence that allegedly defamatory statements were false and were made with actual malice. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Petitioner has not

1. Birmingham Post Company is a wholly-owned subsidiary of Scripps Howard, Inc., which is a wholly-owned subsidiary of the E. W. Scripps Company.

challenged the fundamental holding of the decision below – that the statements at issue are true. Instead, Petitioner continues to complain about the way he was treated by the newspaper and blame his abundant problems in Birmingham on accurate news reports.

STATEMENT OF THE CASE

This case began more than a decade ago, when the City of Birmingham hired Petitioner as its police chief.[2] A native of Brooklyn, New York, with no previous experience or contacts in the Birmingham Police Department, Petitioner was employed on a probationary basis for his first year. He successfully completed the first year, and was officially appointed police chief of Birmingham in December 1982. Shortly thereafter, he became embroiled in one controversy after another with different segments of the government in Birmingham. The Alabama Ethics Commission investigated his decision to accept gifts of large appliances from local businessmen and a discounted mortgage loan from a local banker. *See* Record of the Proceedings Below at pages 1840-43 ("R. 1840-43"), R. 1890-98. The City Council resisted Petitioner's demand for payment of his moving expenses, and one City Council meeting turned into an ugly shouting match between Deutcsh and Councilman Russell Yarbrough. R. 1822-23. Mayor Richard Arrington, who had appointed Petitioner, investigated allegations that Petitioner mistreated two disabled arrestees, and ordered the police

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2. At the time the articles were written and the lawsuit was filed, Petitioner Arthur Deutcsh was chief of the Birmingham Police Department. He was convicted of misdemeanor records tampering, on May 24, 1991, and sentenced to one year of hard labor and a $2,000 fine. He appealed the conviction, and it was overturned by the Alabama Court of Criminal Appeals on July 24, 1992. The case was submitted to the Supreme Court of Alabama for preliminary examination, but the court has yet to decide whether it will issue a writ of certiorari. After his conviction, Petitioner was placed on paid, administrative leave from his duties as police chief. In January 1992, Petitioner fell down the steps of Birmingham City Hall. He was diagnosed with neck and back injuries and awarded a disability pension of $53,732 per year by a 3-2 vote of the Birmingham Retirement and Relief System.

internal affairs department to look into allegations that Petitioner beat a suspect during an interrogation. R. 1650, 1927-30. And the Birmingham Fraternal Order of Police ("FOP") clashed repeatedly with Deutcsh over allegations that he selectively enforced department regulations against FOP leaders. *See, e.g.*, R. 1719-20, 2396, 2398-400, 2505-41.

Plagued by controversy, Deutcsh's tenure as police chief was covered by the local media, including the newspaper, which dutifully informed the citizens of Birmingham about the questionable conduct of the public official charged with ensuring their safety.

After nearly two years of news coverage, Petitioner filed his original complaint on November 19, 1984. It alleged that every word of fifty-seven separate newspaper articles and editorials was both false and defamatory. R. 1-6. To this day, Petitioner has failed to prove that even a single word of a single article is false. *See Deutcsh v. Birmingham Post Co.*, 603 So. 2d 910, 912 (Ala. 1992).

The procedural history of this case demonstrates the considerable effort and expense required to elucidate Petitioner's claims. On February 11, 1985, the newspaper asked the Alabama Circuit Court to dismiss the complaint or force Petitioner to identify which specific statements in the fifty-seven articles were false. Petitioner responded by amending his complaint, but again failed to identify, with specificity, any allegedly false and defamatory statements, prompting the newspaper to file a second motion to dismiss. While the motion was pending, Petitioner again amended his complaint, on April 26, 1985. The Second Amended Complaint, Petitioner's third opportunity to specify false and defamatory statements, failed to do so. The newspaper then withdrew its pending motion and moved to dismiss the Second Amended Complaint for failure to state a claim and for failure to comply with the statute of limitations. On October 11, 1985, the court granted the newspaper's motion in part, dismissing Petitioner's claims based on nine time-barred articles.

In the fall of 1985, the parties embarked on extensive discovery. Petitioner noticed the depositions of twenty-two

persons. The newspaper propounded its First Set of Interrogatories on November 22, 1985. Petitioner did not respond within the required thirty days, and the newspaper filed a motion to compel on February 11, 1986. No answers were received and, on April 14, 1986, the newspaper moved to dismiss the lawsuit based on Petitioner's failure to respond to discovery requests. Petitioner filed incomplete interrogatory answers, and, on October 14, 1986, the court ordered Petitioner to supplement those answers in response to another motion to compel by the newspaper. No supplemental responses were received and, on December 16, 1986, the newspaper moved to dismiss the case for failure to comply with a court order. Petitioner finally supplemented his interrogatory answers on December 29, 1986, over a year after they were served.

A similar scenario unfolded after the newspaper requested documents on November 22, 1985. No documents were produced within thirty days, and the newspaper filed a motion to compel that the court granted on December 31. Petitioner still failed to produce any documents and, on April 3, 1987, the newspaper filed another motion to dismiss based on Deutcsh's failure to comply with court orders. Petitioner then produced a number of documents, but did not fully respond to the newspaper's request. The newspaper followed, on October 13, 1987, with a third motion requesting dismissal of the action based on Deutcsh's failure to comply with court orders.

On June 29, 1988, after nearly three years of frustrated attempts to conduct discovery, the newspaper filed another Motion to Compel a More Definite Statement. The court granted this motion and entered an order to that effect on December 21, 1988. When Petitioner failed to comply, the court entered another order on February 22, 1989. Then, on October 25, 1989, the newspaper filed yet another motion to dismiss based on Deutcsh's failure to comply with court orders because, after nearly five years of costly litigation, Petitioner still had not identified any specific statements as allegedly false. Eventually, on April 24, 1990, Petitioner identified 137 specific statements in thirty separate articles which he claimed were false and defamatory.

Having finally succeeded in flushing out Petitioner's claims, the newspaper filed a motion for summary judgment on September 21, 1990. After considering the issues for nearly a year, the Circuit Court granted the motion and dismissed the case with prejudice on September 16, 1991.

Petitioner appealed the Circuit Court's dismissal of his claim to the Alabama Supreme Court. Although the trial court had winnowed the case down to thirty articles, his appeal only addressed thirteen. The Alabama Supreme Court held that Deutcsh had waived any claim of libel based on the other seventeen articles and upheld the dismissal of his remaining claims on multiple grounds after considering the voluminous record and briefs filed by both parties.[3] *See Deutcsh*, 603 So. 2d at 911-12. The court's opinion states:

(1) there was "no clear and convincing evidence of libel in any of the statements in the articles";

(2) "Deutcsh failed to present evidence that the statements in the non-editorial articles were false and defamatory . . ."; and

(3) "Deutcsh failed to show that any of the statements of public concern in the editorials contained a provably false factual connotation."

Id. at 912. Petitioner applied for rehearing, which was denied on August 7, 1992.

Thus, after eight years of litigation and extensive effort on the part of the newspaper and the Alabama courts, Petitioner's claims have been limited to twelve[4] articles and editorials published in the *Post-Herald* during 1983, 1984, and 1985. These news stories are unremarkable reports about routine controversies that occur in many municipalities every day. Their

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3. Petitioner's Alabama Supreme Court Brief and Reply totaled ninety-one pages, excluding appendices. The newspaper's brief was sixty-two pages and included a four-volume appendix of over 1,500 pages.

4. Petitioner requested that the Alabama Supreme Court review claims based on *thirteen* articles, but only references *twelve* in his Petition to this Court. Accordingly, Petitioner has abandoned any review of a claim based on the omitted May 23, 1984 article. *See infra* at 7.

ordinariness hardly makes them less newsworthy. United Press International, for example, carried seventy-four separate stories about Deutcsh's exploits between November 1983 and February 1985. *See, e.g.*, R. 1959, 2017, 2393-94, 2396-97.

This Petition is nothing more than the final stage of a public official's attempt to make the newspaper "pay" for reporting the news. Unable to prevail on the merits, he has subjected the newspaper to years of costly litigation. Petitioner's actions have shown that he is, as Mayor Arrington stated, "too sensitive to criticisms, sometimes needlessly abrasive, and quite 'bull-headed.'" R. 2488 (February 1985 performance evaluation of Deutcsh submitted to Jefferson County Personnel Board by Mayor Arrington).[5] As a visible public official whose conduct had a discernable impact on the everyday life of each citizen of Birmingham, Petitioner could hardly expect to remain free from news coverage or commentary. But apparently he had precisely such expectations.

REASON FOR DENYING THE WRIT

REVIEW IN THIS COURT IS INAPPROPRIATE BECAUSE THERE HAS NEVER BEEN A LIBELOUS STATEMENT PUBLISHED ABOUT PETITIONER WITH OR WITHOUT ACTUAL MALICE.

A. Petitioner Has Never Established That A False Statement Was Made About Him.

To establish a *prima facie* case of libel under Alabama law, Petitioner must prove by clear and convincing evidence that each allegedly defamatory statement was:

(1) false and defamatory;

(2) of and concerning him;

(3) not privileged; *and*

(4) published with actual malice.

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5. Mayor Arrington also noted Petitioner's "tendency to be argumentative" and "disagreeable," his inability "to maintain his 'cool' in the face of hostile inquiry and accusation," and his "tend[ency] to ignore advice which differs from his opinions." R. 2157 (February 1984 performance evaluation), R. 2488 (February 1985 performance evaluation).

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. at 775-76; *New York Times Co.*, 376 U.S. at 286-91; *McCaig v. Talladega Publishing Co.*, 544 So. 2d 875, 877 (Ala. 1989), *citing* Restatement (Second) of Torts § 558 (1977); *White v. Mobile Press Register, Inc.*, 514 So. 2d 902, 904 (Ala. 1987).

Petitioner has chosen not to request review by this Court of the central holding below that he had failed to prove falsity. He quibbles only with the lower court's consideration of evidence relating to actual malice. *See* Petition at 27. It must, therefore, be presumed that Petitioner has abandoned his claim of falsity and that his long road in this litigation ends with the tacit acknowledgment that the newspaper's reports about his problems in the community were true. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 694 (1989) ("*Connaughton*") (Blackmun, J., concurring) ("Petitioner has abandoned the defense of truth. . . . We therefore must presume that the jury correctly found that the article was false . . ."); *Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991) (failure to include a legal argument in a statement of the issues waives that argument).

Truth is an absolute defense to any action for defamation. By abandoning and otherwise failing to prove falsity, Petitioner has neglected to establish an essential element of any defamation action. *See, e.g., New York Times Co.*, 376 U.S. at 271-72. The Alabama Supreme Court, after finding Petitioner could not establish even the threshold element of libel (*i.e.*, falsity), chose not to address the second and third elements – whether the articles were of and concerning Petitioner and whether the publication was privileged – although both issues were briefed for the court. The court did go on to consider Petitioner's actual malice argument, and found it utterly lacking.[6]

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6. Even if Petitioner were correct in his unsupported assertion that the Alabama Supreme Court did not consider evidence of actual malice, it would not alter the fact that dismissal of this action was appropriate because the statements at issue are true. *See New York Times Co.*, 376 U.S. at 271-72; *see also* 28 U.S.C. § 2111 (1988) ("[o]n the hearing of any . . . writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").

B. Petitioner Has Never Established By Clear And Convincing Evidence That A False Statement Of Fact Was Made With Actual Malice.

It is now firmly established that the Constitution of the United States requires a public official, in order to prevail in a libel suit, to prove by clear and convincing evidence that each false and defamatory statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 279-80; *see also Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429-30 (1991). If a public official fails to make such a showing at the summary judgment stage, summary judgment for the defendant is appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986) (federal law); *Pemberton v. Birmingham News Co.*, 482 So. 2d 257, 260 (Ala. 1985) (Alabama law).

Petitioner's claim that the Alabama Supreme Court did not properly consider his evidence of actual malice is unsupported by the record and belied by the court's own words. The court left no doubt that it considered and rejected Petitioner's proffered evidence of actual malice as unreliable and insufficient to meet his weighty burden. Its opinion states that the court "thoroughly" reviewed the articles at issue and "[v]iew[ed] the evidence in a light most favorable to Deutcsh . . . ." *Deutcsh*, 603 So. 2d at 912. After reviewing a record of over 2,500 pages, the court's decision not to discuss specific evidence of alleged actual malice, either in support of or contrary to Petitioner's claims, is understandable and perfectly proper.[7]

No reasonable jury could find that a specific false statement here was published with actual malice. *See Anderson*, 477 U.S. at 257 ("reasonable jury" standard applies to motion for summary judgment on the issue of constitutional malice). By definition, actual malice cannot exist where falsity does not. *See*

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7. The court was well aware of Deutcsh's relentless argument that the newspaper was "out to get" him, *see, e.g.*, Petition at 3, and found the argument unavailing. Petitioner's Brief to the Alabama Supreme Court quoted the portions of his deposition supporting his actual malice claim; those same deposition excerpts were again referenced in his Reply Brief. *See* Brief and Argument of Appellant Arthur V. Deutcsh at 7-9; Reply Brief of Appellant Arthur V. Deutcsh at 4.

Philadelphia Newspapers, Inc., 475 U.S. at 778 ("evidence offered by plaintiffs on the publisher's fault . . . will generally encompass evidence of the falsity of the matters asserted"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (actual malice is a subjective standard requiring proof that the publisher had a "high degree of awareness of . . . probable falsity . . ."); *Shutt v. Harte-Hanks Communications, Inc.*, 7 Media L. Rep. (BNA) 2559, 2562 (E.D. Mich. 1981) ("[a]n action for libel cannot be based on a claim of lack of fairness, so long as the article in question is truthful"). And, because Petitioner has not carried his burden of proving that even a single statement in the articles is false, he cannot prove actual malice.

Petitioner's "evidence" of actual malice is nothing but bald allegations and invective. He claims that, at a cocktail party, the then-editor of the *Post-Herald* threatened to run him out of town, but the only proof offered for this highly implausible suggestion is Petitioner's own uncorroborated deposition testimony. He also claims that the author of several editorials relied on "known unreliable sources," but no evidence or other proof has been adduced or offered in the course of this eight-year litigation. Without support, these conclusory allegations are insufficient as a matter of law. *See Anderson*, 477 U.S. at 248-49. Finally, Petitioner offers the impressions of Mr. Glosecki, a Professor of Old English Literature at the University of Alabama with no journalistic experience. Glosecki's notions are not competent evidence of actual malice and address an issue which is left to the province of a jury in a libel case – the meaning of language.[8]

This hodgepodge falls far short of proving by clear and convincing evidence that the newspaper was aware the statements were false or "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, Petitioner tries to shoehorn his bare allegations into the "'unmistakably' sufficient" evidence of actual malice addressed by this Court in *Connaughton*. *See* 491 U.S. at 693,

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8. Although Petitioner refers to Glosecki as an expert, no experts have been designated or qualified in this case because there was no trial below. *See* Fed. R. Evid. 702.

quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 172 (1967). This case, however, is not *Connaughton*. There, the defendant intentionally neglected to interview the witness most likely to corroborate or dispute the statements, and chose not to listen to tape recordings which were available to disprove the statements. 491 U.S. at 683. Here, the articles and editorials are ordinary, balanced reports of typical controversies surrounding a local public official. And, unlike the statements in *Connaughton*, they are true.

CONCLUSION

The articles and editorials at issue are the bread and butter of a local newspaper. They are reports, and commentary, about a chief of police who was accused of committing police brutality, accepting gifts from local businessmen, mistreating a paraplegic and a quadraplegic, and badgering officers who were active leaders in the police union. From time to time, public officials in America doggedly pursue libel cases against newspapers for accurately reporting such events. Twenty-five years after the Commissioner of Montgomery, Alabama generated *New York Times Co. v. Sullivan*, a former Police Chief in Birmingham, Alabama has now reminded us that it can take eight years for a meritless libel case to reach a merciful end.

For the foregoing reasons, Respondent Birmingham Post Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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